



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

May 18, 1995

DOCKET FILE COPY ORIGINAL

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

**VIA FEDERAL EXPRESS**

RECEIVED

MAY 19 1995

Re: In the Matter of Computer III Further Remand Proceedings: FCC 95-10001  
Bell Operating Company Provision of Enhanced Services  
CC Docket No. 95-20

Dear Secretary Caton:

Enclosed for filing with your office is an original and nine (9) copies of the Reply Comments of the Pennsylvania Public Utility Commission in the above captioned proceeding. A copy of our Reply has been provided for each of the Commissioners. Additionally, service has been made upon all known parties of record.

Thank you for your assistance with this matter.

Very truly yours,

Maureen A. Scott  
Assistant Counsel

Encl.

No. of Copies rec'd  
List A B C D E

029

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of )

COMPUTER III FURTHER REMAND )  
PROCEEDINGS: BELL OPERATING )  
COMPANY PROVISION OF ENHANCED )  
SERVICES )

Docket No. 95-20

MAY 19 1995

---

REPLY COMMENTS OF THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

---

**I. Introduction**

The FCC released this Notice of Proposed Rulemaking ("NOPR") in response to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") October 18, 1994 remand of the BOC Safeguards Order.<sup>1</sup> In California III, the Ninth Circuit held that the FCC had not sufficiently explained its conclusion that eliminating structural separation was in the public interest and that its Open Network Architecture ("ONA") regime provided an adequate safeguard against access discrimination by the BOCs in light of the fact that the FCC's ONA requirements no longer calls for fundamental unbundling of the BOC networks. In addition to the issue raised by the Ninth Circuit's decision, the FCC is undertaking a broad cost/benefit analysis of structural versus nonstructural safeguards, and, is also reevaluating the most effective regulatory

---

<sup>1</sup>See People of the State of California v. FCC, 39 F.3d 919 (9th Cir. 1994), cert. denied, 63 U.S.L.W. 3540, and, cert. denied, 63 U.S.L.W. 3564 (April 3, 1995) ("California III").

framework for the provision of enhanced services by BOCs.<sup>2</sup>

As a general proposition, the PaPUC supports the FCC's ONA policies. Like federal law, Chapter 30 of the Pennsylvania Public Utility Code<sup>3</sup>, enacted in 1993, relies to a significant extent on network unbundling and other nonstructural safeguards to achieve important public policy and consumer protection goals.

On the other hand, the results of the FCC's nonstructural safeguards regime are "mixed" at best. The initial comments of some parties contain many examples of BOC malfeasance in complying with FCC ONA requirements and accounting rules. However, rather than some omission in the rules themselves, PaPUC attributes existing inadequacies to the FCC's "one-size-fits-all" approach which precludes regulators from being able to target appropriate remedies including structural separation to specific carriers, markets or services on an as needed basis. The broad brushed approach will become increasingly problematic in the future as markets take on varying degrees of competition.

We also believe that the current system is ineffective because as the Georgia MemoryCall decision illustrates, the FCC's preemption of State structural separation policies creates a vacuum for intrastate service violations which leave State regulators without any effective redress in some cases. Federal and State policies are now actually working against each other rather than complimenting one other as they otherwise would when both jurisdictions' rules are allowed to operate in the normal course of business.

Consequently, while the PaPUC does not support an across the board federally mandated

---

<sup>2</sup>Notice at 10.

<sup>3</sup>66 Pa.C.S.A. Section 3001 et seq.

structural separation requirement for all services, carriers and markets at this time, it believes that the rules must be modified to accommodate corrective measures where warranted, on a service and/or market or State basis. This is the only effective solution since it would permit redress where needed without imposing these same drastic across the board remedies in markets or for services where corrective action is not otherwise warranted or desirable. While this could be accomplished through the waiver process, an option discussed in the Notice, PaPUC believes that the optimal solution would permit States to make the structural separation determination given market conditions within their particular jurisdiction.

## **II. Discussion**

### **A. While PaPUC Supports the FCC's ONA and Nonstructural Safeguards Regime, the Results of the FCC's Policies Indicate That Some Modification is Necessary.**

PaPUC generally supports the FCC's ONA and nonstructural safeguards regime.

Chapter 30 of the Pennsylvania Public Utility Code, 66 Pa.C.S.A. Section 3001, et seq., is consistent with federal unbundling policies providing in pertinent part:

"(1) The local exchange telecommunications company shall unbundle each basic service function on which the competitive service depends and shall make the basic service functions separately available to any customer under nondiscriminatory tariffed terms and conditions, including price, that are identical to those used by the local exchange telecommunications company and its affiliates in providing its competitive service."<sup>4</sup>

PaPUC is addressing the unbundling issue in a pending proceeding.<sup>5</sup>

---

<sup>4</sup>66 Pa.C.S.A. Section 3005(a)(1).

<sup>5</sup>See Investigation Pursuant to Section 3005 of the Pennsylvania Public Utility Code, 66 Pa.C.S. Section 3005, and the Commission's Opinion and Order at Docket No. P-930715 to Establish Standards and Safeguards for Competitive Services and With Particular Emphasis in the Areas of Cost Allocation, Cost Studies, Unbundling and Imputation and to Consider Generic

While PaPUC does not believe that it would be appropriate for the FCC to adopt a federally mandated broad based structural separation requirement at this time,<sup>6</sup> this is not to say that federal ONA policies or nonstructural safeguards cannot be improved upon and are not in need of revision. The initial comments of others and the FCC's own findings since its ONA regime has been in effect, indicate some serious underlying problems with the current regime.

Perhaps the most obvious case involving the inadequacy of current nonstructural safeguards as evidenced by BOC access discrimination involved the provision of Voice Mail Service ("VMS") by BellSouth in Georgia. After finding anticompetitive behavior by BellSouth in the provision of VMS, the Georgia Public Service Commission ("Georgia PSC") temporarily barred BellSouth from offering the intrastate portion of its VMS to new customers until the Georgia PSC could craft effective regulatory safeguards within the confines of the FCC's nonstructural regime. However, before the Georgia PSC was able to act, BellSouth immediately sought and obtained an FCC order preempting the Georgia PSC's action.<sup>7</sup>

The comments of more than one other party contain a litany of allegations involving anticompetitive behavior by BOCs in the provision of enhanced and other services since the Commission's nonstructural safeguards were adopted.<sup>8</sup>

Issues for Future Rulemaking, Docket No. M-940587.

<sup>6</sup>Accord Comments of the Public Service Commission of Wisconsin.

<sup>7</sup>See In re Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp., Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992), aff'd unpub. without opin., Georgia Public Service Commission v. FCC, No. 92-8257 (11th Cir. 1993).

<sup>8</sup>See e.g., Comments of MCI Telecommunications Corporation, p.p. 33-38. (Comments list 14 separate allegations of anti-competitive behavior by BOCs in the provision of enhanced and other services.)

Moreover, the results of recent federal/State audits have been less than encouraging.<sup>9</sup>

PaPUC believes that the ineffectiveness of the existing rules in many of these cases is a direct result of the FCC's "one-size-fits-all" approach which does not permit regulators to target the structural separation remedy to troublesome markets and carriers where it would be most effective. Consequently, we believe that the only solution is to adopt a structural separation policy geared more toward specific services and/or markets. Such an approach would allow regulators to directly target problem carriers and markets, without imposing this remedy on other markets or services where such action may not be either warranted or desirable. We believe that overall a policy of this nature would be more effective in stopping BOC abuse and in striking the appropriate balance between federal and State regulation.

We concur with both Chairman Hundt and the Wisconsin Public Service Commission that new policies and approaches are needed.<sup>10</sup> However, we believe that any new policy must recognize that homogeneous markets are a thing of the past and that due to technological and

---

<sup>9</sup>See Comments of MCI Telecommunications Corporation, pp. 41-45. See also In the Matter of the Bell Atlantic Telephone Operating Companies, AAD 93-147, Order to Show Cause, (March 3, 1995) ("The independent auditor's findings that we address here involve the misstatement or miscalculation of \$23.2 million of interstate costs and revenues from January 1988 through March 1989. In the aggregate, these misstatements or miscalculations apparently benefited Bell Atlantic to the detriment of the users of Bell Atlantic's interstate telecommunications services. ...The seriousness of the misstatements is compounded here not only because of the net impact and the extent of the overstatements, but also because of the scope of the errors or apparent violations and the fact that at least one of them apparently has continued to the date of this Order to Show Cause. The apparent violations reveal Bell Atlantic's apparent failure to maintain accounts, records, and memoranda in the manner prescribed by the Commission.") Id. at p. 6.

<sup>10</sup>See Comments of the Public Service Commission of Wisconsin p. 1 (citing a February 13, 1995 article in Telecommunications Reports in which Chairman Hundt described the history of the Computer Inquiries as long and tortured, and stated that the agency [the FCC] cannot simply repackage its previous policies and gird itself for another round of legal wrangling.)

regulatory changes, BOCs may offer many nontraditional nonvoice service offerings in the future to which the old arguments for integrated operations of efficiency and cost-effectiveness no longer apply.

**B. A Broad Based Federally Mandated Structural Separation Policy Is Not the Answer, Rather The Commission's Policies Should Be Structured to Address Specific Services, Markets and Carriers if Necessary.**

The Commission's broad based policies will become even less effective in the future as once homogenous markets become more competitive resulting in an even greater risk for cross-subsidization and access discrimination. Additionally, State regulation is likely to be as varied as the markets that they regulate. Consequently, the Commission needs to develop a policy that will better accommodate these extreme variances between States and markets in the future. Only a structural separations policy which can be targeted toward particular services, markets and/or carriers can truly be effective in the future.

For instance, a more market specific approach would have been much more effective in addressing the problems which arose in Georgia with BellSouth's MemoryCall service. Appropriate State and federal policies, including structural separation, could have been crafted to specifically target BellSouth's offering of MemoryCall in Georgia. Under current policies, structural separation, no matter how appropriate, was not even a possibility. Additionally, the State of Georgia could not even prevent BellSouth from offering its service until it could craft alternative remedies. Consequently, the FCC's policies had created a "vacuum" for intrastate rule violations which could not be effectively redressed at either the State or federal level.

Additionally, the FCC's current policies apply uniformly to all services. However, with the convergence of voice, video and data services, telephone companies may be offering many

nontraditional type services in the future. These offerings may be so different in nature from traditional voice services that the same economies of scale or efficiencies associated with integrated voice enhanced service operations may not apply. In such cases, the risk of cross-subsidization would greatly outweigh the minimal benefit associated with integrated operations so that structural separation would be desirable in these cases. A case in point may be LEC in-region programming ventures.

In its Notice, the FCC inquires whether a waiver procedure would be desirable.

"Parties are asked to provide evidence as to whether the current Computer III regime of nonstructural safeguards or a Computer II-like framework of structural separation with the possibility of waivers permitting the BOCs to offer specific enhanced services on an integrated basis better serves the public interest. We also seek comment on whether such waivers, if granted, should be conditioned upon compliance with specific safeguards, and which safeguards would be appropriate."<sup>11</sup>

PaPUC does not support the use of the waiver process as discussed in the Notice, since this approach appears to be premised upon the implementation of a broad based Computer II-like framework of structural separation at the federal level. As discussed in more detail below, PaPUC favors State determinations with respect to particular services, and troublesome markets and carriers.

**C. The FCC Should Permit State Structural Separation Requirements If Conditions Within the Particular State and Market Warrant.**

Preemption of State structural separation policies improperly ties the States' hands when conditions within their particular jurisdiction may warrant the more drastic remedial measure of structural separation.

---

<sup>11</sup>Notice at p. 10.



PaPUC has the express authority under State law to impose a separate subsidiary requirement where there is a substantial possibility that the provision of the service on a nonseparated basis will result in unfair competition. 66 Pa.C.S.A. Section 3005(h) provides:

"For local exchange telecommunications companies serving over 1,000,000 access lines, the commission may require that a competitive service be provided through a subsidiary which is fully separated from the local exchange telecommunications company if the commission finds that there is a substantial possibility that the provision of the service on a nonseparated basis will result in unfair competition."

However, under existing federal policies, the PaPUC could not carry out its authority under State law and require a separate subsidiary even where there was a finding of a "substantial possibility that the provision of the service on a nonseparated basis" would result in unfair competition.

This would lead to much the same situation as encountered with the Georgia MemoryCall case, in which the current preemption of State structural separation requirements creates a vacuum "within which there might be little capability to control BOC provision of enhanced services effectively."<sup>12</sup>

We, therefore, believe that the FCC's new policy must allow at a minimum State structural separation requirements if conditions within the particular jurisdiction warrant. In this way, federal and State policies would compliment one another, and States would not be entirely deprived of their most effective remedy in instances where LECs have been found to be in flagrant violation of State rules for intrastate services.

The major shortcoming of the Commission's current policies is the rules' failure to

---

<sup>12</sup>See Comments of MCI Telecommunications Corporation, p. 26.

balance cost and expediency concerns favoring integrated provision of services by BOCs with legitimate cross-subsidization and discrimination concerns, especially as they relate to the provision by BOCs of intrastate enhanced services.

**D. The Record Establishes that the Commission Should Reevaluate its CPNI Policies.**

PaPUC also agrees with several parties that the Commission's CPNI rules are in need of revision.<sup>13</sup> PaPUC believes that current CPNI policies do not adequately address:

1) customer privacy expectations, and, 2) the unfair competitive advantages provided the LEC simply because of its traditional role as a monopoly service provider.

PaPUC believes that the Commission's original goal of creating a mass market for enhanced services has, at least if the BOC statistics presented in this proceeding are any indication, been met and that now is the time to develop much needed symmetry in the rules for ESPs. There is no question that the current federal rules which permit the BOCs to market both basic and enhanced services together for customers with under 20 access lines, provides a distinct competitive advantage to the BOC simply because of its status as monopoly service provider.

PaPUC believes that the preferred approach is prior customer authorization in all cases. At a minimum, the BOCs should be required to inform the customer that there are alternative ESPs available.

It is also important that the FCC's policies accommodate State CPNI requirements.

---

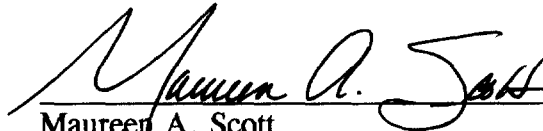
<sup>13</sup>See Comments of the Information Technology Association of America, pp. 29-31; Comments of the Public Service Commission of Wisconsin, p. 7; Comments of the Ad Hoc Telecommunications Users Committee, pp. 9-10.

Absent the need to create a "mass market" for enhanced services, there is no longer any need for the FCC to preempt State CPNI requirements.

### **III. Conclusion**

The Pennsylvania Public Utility Commission supports the adoption of a new regulatory regime to govern BOC provision of enhanced services consistent with the above comments. Rather than a broad based federally mandated structural separation requirement, the new regulatory regime should permit States to impose structural separation if conditions within their respective jurisdiction warrant. The Commission should also revise its CPNI rules to establish much needed symmetry between the LECs and their competitors, and to recognize State requirements in this regard.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Maureen A. Scott", is written over a horizontal line.

Maureen A. Scott  
Assistant Counsel

Veronica A. Smith  
Deputy Chief Counsel

John F. Povilaitis  
Chief Counsel

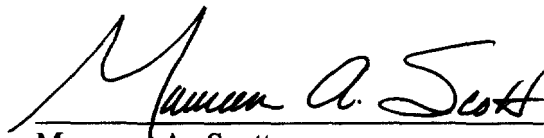
Attorneys for the Pennsylvania  
Public Utility Commission  
P.O. Box 3265  
Harrisburg, Pennsylvania 17055-3265  
Telephone: (717) 787-4945

Dated: May 18, 1995.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing REPLY COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION have been served this 19th day of May, 1995, upon all known parties of record herein.

Executed at Harrisburg, Pennsylvania, this 19th day of May, 1995.

  
Maureen A. Scott

Counsel for the Pennsylvania  
Public Utility Commission